General report

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Part 1
General Report

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1.1. Introduction

This general report deals with a number of topics. These topics concern terminology, i.e. the different concepts in uses with regard to retroactivity (and retrospectivity), ex ante evaluation of retroactivity; the use of retroactivity in legislative practice, ex post evaluation of retroactivity (in case law), and views in the literature. In the parts on ex ante evaluation of retroactivity, the use of retroactivity in legislative practice and ex post evaluation of retroactivity (in case law), the focus is on the various possibilities to use retroactive tax legislation and limitations on the use of retroactive tax legislation. In presenting the information with regard these topics we will not always strictly follow the questionnaire; for the purpose of readability we sometimes combine related issues (questions). Of course, it is not possible to present the information in the national reports down to the smallest detail. The answers received to some questions were too diverse to recapitulate in this general report.

Another set of remarks concerns the focus of the questionnaire and this general report. The focus is mainly retroactivity of tax legislation. The issue of retroactivity of case law is thus not discussed in this general report, notwithstanding the importance of the subject.[1] Furthermore, in particular retroactivity of Acts of Parliament is discussed. Thus, hierarchical lower tax rules, such as subordinate legislation, regulations, decrees, etc. are largely left aside. Moreover, we mainly deal with substantive tax law and not with procedural tax law. Finally, the focus is on tax law, not on criminal law; hence, retroactivity with regard to criminal offences against taxation laws is only indirectly touched upon.

As concerns the method used, we note the following. First, a draft questionnaire was compiled and sent to the various national reporters for comments. Some of the national reporters provided us with comments, which we used to adjust and to extend the questionnaire. The final questionnaire was then sent to the national reporters.[2] The national reporters submitted (draft) national reports based on the questionnaire. These national reports have been used in writing a draft general report. This draft was published on the EATLP website for the purpose of the 2010 EATLP congress in Leuven on 28 May 2010. After the 2010 EATLP congress, the draft was sent to the national reporters for consultation. The national reporters were invited to comment on the draft general report, especially whether the report contained vague or even mistaken interpretations of the national reports or needed to be supplemented. Some national reporters provided us with comments, for which we are very grateful. The national reporters were also asked to finalize their national reports further to the EATLP congress. In this respect, we asked some of the national report-

1. During the 2010 EATLP congress, one debate session concerned this subject, in particular retroactivity of case law of the ECJ. This debate was introduced by Mathieu Isenbaert; debaters were Peter Wattel and Pasquale Pistone.
2. The questionnaire is included in this book.

ers individually to expand on some issues in their report, either because the issue discussed was interesting and deserved more attention or for clarification reasons. This general report has been written based on the draft version of the general report, the comments from the national reporters on it, the final national reports, and the discussions during the EATLP congress. Compared to the draft version, information concerning more countries has been included in this final general report, since not every national report was available at the moment the draft version was compiled.

Finally, this report could not have been written without the work done by the national reporters; we are very grateful for their industry.

1.2. Terminology

1.2.1. Introduction

Before it is possible to analyse the issue of retroactivity with respect to substance, the terminology used should be made clear. This is necessary because there is an important risk of misunderstanding. The reason is that, in the literature as well as in case law, different concepts are used with various meanings when dealing with the phenomenon of retroactivity in legislation.[3]

We note that when dealing with the issue of retroactivity in this report we do not make a distinction between the introduction of a tax statute and the change (amendment) of an existing tax statute, for there is no conceptual difference between the two. After all, a change in an existing statute is realized by means of the introduction of a statute that provides for the change.

1.2.2. Retroactive vs. retrospective

In the English language a potential misunderstanding may arise when using the concepts of retroactivity and retrospectivity. First of all, these concepts are sometimes (implicitly or explicitly) considered synonyms or interchangeable, but sometimes a conceptual distinction is (implicitly or explicitly) made between retroactivity and retrospectivity. Secondly, *if* a conceptual distinction is made, the meaning of retroactivity and retrospectivity is not the same in the various countries and legal discourses in which English is spoken or used. It is even the case that what in the one country is called 'retroactive', in another country is called 'retrospective', and *vice versa*. This latter has been established more in particular for the area of taxation by, for example, Bobbett in an article in *British Tax Review*[4] with references to the way both terms are used in the case law in various English-speaking countries. The mixed use of retroactivity and retrospectivity has also been noted in the national reports of Canada and the United Kingdom.

3. See in this regard amongst others Catherine S. Bobbett, 'Retroactive or retrospective? A note on terminology', *British Tax Review* (2006), at pp. 15-18 and M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen* (Retroactivity of tax legislation: weighing and balancing) (Amersfoort: Sdu Uitgevers, 2009), chapter 2.
4. Bobbett, *supra* note 3, at pp. 15-18. See also E. Edinger, 'Retrospectivity in law', *University of British Columbia Law Review*, (1995), at p. 10, G.T. Loomer, 'Taxing out of time: parliamentary supremacy and retroactive tax legislation', *British Tax Review* (2006), at pp. 65-66, and B. Juratowitch, *Retroactivity and the common law*, (Oxford: Hart Publishing, 2008), at pp. 5-13

In accordance with Bobbett's[5] proposal and in line with the way the ECJ uses the term[6], this general report uses the term 'retroactive' for the situation in which a legal provision changes the past legal consequences of facts that occurred before the provision was officially published. In other words, the term is used where the legal provision is applicable to taxable events that occurred prior to its official publication. The term 'retrospective' will be used for the situation in which a new legal provision has 'immediate effect', without grandfathering[7] existing situations, and as such is also applicable to the future consequences of transactions or events that have already happened.[8]

In almost all countries, the courts or at least legal discourse does make a comparable conceptual distinction between 'retroactivity' and 'retrospectivity' (*casu quo* between the national counterparts of these concepts).[9] It is interesting to mention that in many of these countries the national language has its limits in the sense that, other than in the English language, two separate terms are not available. In these countries the language has only one term, but nonetheless a conceptual distinction between 'retroactivity' and 'retrospectivity' is achieved, e.g. by adding adjectives to the term (e.g. formal and material, true and untrue, etc.).

The above-mentioned use of the concepts of 'retroactive' and 'retrospective' in this report implies that the term 'retroactive' is used in the narrow sense. In the literature, not only the law and economics literature but also in other legal literature, the term 'retroactive' is sometimes also used in the broad sense, i.e. also covering what is called here 'retrospective'.[10]

The risk of conceptual misunderstanding also appears from the fact that a great variety of terms exists. This is confirmed by analysis of the various national reports. These reports show that a many different terms are (or were) used in the various countries. Terms are used such as 'actual retroactive', 'formal retroactive', 'true retroactive', 'real retroactive', 'absolute retroactive', 'juridical retroactivity', 'maximal retroactivity', 'retroactive *stricto sensu*', and 'proper retroactivity'; these terms correspond more or less with what is called 'retroactive' in this report. Further, terms are used such as 'non-actual retroactive', 'material retroactive', 'pseudo retroactive', 'unreal retroactivity', 'de facto retroactive', 'relative retroactive', 'improper retroactive' 'medium retroactive', 'false retroactive', 'inappropriate retroactive', 'retroactive in the social sense' and 'economic retroactive'; these terms more or less correspond with what is called 'retrospective' in this report. Moreover, illustrative for the potential misunderstanding is that in Denmark the term 'material retroactive' is used for what in this report is called 'retroactive', while in other countries, if used, the term is usually

5. Bobbett, *supra* note 3, at p. 8 concludes: 'perhaps it would be better to follow the Canadian meaning: restrict retroactive to statutes that alter or do something to the past (Latin: *retroagere* meaning to lead back, to reverse); and use retrospective for statutes that recognise past transactions but alter the consequences of them in the future without changing the past (Latin: *retrospicere* meaning to look back).' See also the Canadian report for the present Canadian use of the concepts of 'retroactivity' and 'retrospectivity'.
6. E.g., ECJ C-376/02, 26 April 2005, case *Stichting Goed Wonen*.
7. Grandfathering means, in short, that the old rule remains (temporarily) applicable to certain situations.
8. As discussed below, a further distinction is made in Canada.
9. Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Sweden, Turkey. However, in Finland only one term (*taannehtivuus*) is used, and in fact only for the phenomenon retroactivity and not for the phenomenon retrospectivity. Furthermore, in Greece in principle only one term is used without making a distinction; it should be noted that although in the Greek literature a distinction is sometimes made between 'true retroactivity' and 'non-true retroactivity', the latter concept does not correspond with 'retrospectivity', but in fact seems to be a special variant of 'retroactivity'.
10. Note that the US reporter remarks that, in the US, a clear distinction between retroactivity and retrospectivity is not usually made, and that the term 'retroactive' is often used to describe both.

used for what is called in this report 'retrospective'.[11] Another example is the use of the term 'non-true retroactivity' in Greece. In the Greek theory of law, the term does not correspond to 'retrospectivity' (as one may expect) but refers to the phenomenon that the legislator 'intervenes' in procedures that are pending for the tax authorities or the courts,[12] which – in the terminology of this general report – is an example of retroactivity.

Finally, we note that although it is conceptually possible to make a distinction between retroactivity and retrospectivity, the difference between these two has less relevance from the viewpoint of legal certainty and of their impact. From these viewpoints, the difference between retroactivity and retrospectivity is mostly considered to be a matter of degree.[13]

1.2.3. **Retrospectivity**

We note that also national reporters of the countries in which the concept 'retroactivity' is distinguished from the concept 'retroactivity' – as described above –, often remark that the concept of 'retrospectivity' is not well-defined or is an 'open concept' or is 'rather vague'.[14]

On the one hand, it appears that some cases of legislation would certainly be called retrospective. In the questionnaire, the example is given of a statute that enters into force on 1 January 2010, and that stipulates that a certain tax exemption is repealed as from that date without the grandfathering of accrued but unrealized gains. As a result, gains that accrued prior to 1 January 2010 but that are realized after that date are not tax exempt either, although they accrued in a period when the exemption applied.[15]

On the other hand, it is hard to provide general criteria to draw a line between retrospectivity of a statute and non-retrospectivity of a statute, taking into account that a new statute generally – unless there is a grandfathering provision – has some influence on future consequences of past events and past transactions. A fine example of the latter issue is provided in the German national report.[16] Noteworthy is that Hungary not only has a broad concept of retrospectivity,[17] but also prohibits retrospectivity. So grandfathering is the main rule in Hungary. Furthermore, in Denmark, legislative practice reveals that retrospectivity ('non-actual retroactivity') is avoided if at all possible (although there is no prohibition of it in the Danish constitution). As a result, transitional rules tend to be extensive and very complicated.

We note that in the literature on legal theory it is generally accepted that it is not possible to make a sharp distinction between retrospectivity and non-retrospectivity. To the contrary, retrospectivity is mostly considered to be a matter of degree. Also, especially the law and economics literature remarks that (almost) any change in tax rules will have an effect on the value of assets and liabilities, and from that point of view is retrospective.

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11. In Denmark the term 'formal retroactive' is used for the situation in which the tax authorities apply a statute before the statute enters into force. In the Netherlands, the term 'formal retroactive' is used for what is called 'retroactive' in this general report.
12. However, this is not the opinion in the case law of Greek administrative tax courts which consider the legislature's intervention in pending trials to be a case of retroactivity.
13. See in this respect the contribution of Melvin Pauwels in this book, with further references to the literature.
14. Austria, France, Germany, Italy, the Netherlands, Portugal, Sweden.
15. See also the national reports of Denmark, Hungary, the Netherlands and Turkey discussing this (or a comparable) example.
16. Another example is the discussion in Danish legal discourse with respect to the question whether or not in the situation in which new legislation affects 'facta pendentia' (this is legislation that has an effect on continuous events and/or transactions, and as such also covers events that occur partly before and partly after the point of time when the relevant statute comes into effect) the legislation can be characterized as retroactive.
17. For example, if a statute changes the taxation of interest, and would also be applicable to existing loans, this would be considered retrospective.

Further, we note that it may sound appealing to draw the line between retrospective and non-retrospective at whether or not legitimate expectations are infringed by the statute concerned. However, this approach not only mixes up the conceptual question with the question of the legitimacy, it also shifts the issue, namely to the question which standards should be used to assess whether expectations are legitimate or not.

Notwithstanding the above, in some countries a definition of retrospectivity is available. For example, the Belgian reporter provides as definition that a retrospective rule has an immediate effect, which implies that a new legal rule is both applicable to legal facts that occur after the date of entry into force of this new rule, as well as to legal consequences occurring after the date of entry into force, even though these consequences relate to legal facts that took place before this date. In the same line the reporter for Turkey describes retrospectivity as the case in which a new tax provision affects the tax obligations of the taxpayer after the commencement, but prior to the completion, of the taxable event. In Denmark the concept of retrospectivity ('non-actual retroactivity') is related to the situation of 'facta pendentia'; it concerns legislation with an effect on continuous events or transactions. Furthermore, interestingly, in Canada a further distinction is made with respect to what is called in this general report 'retrospective'. In Canada the term 'retrospective' is only used for a statute that changes the future legal consequences of transactions or events that already happened. The term is not used where a statute has immediate effect on current, continuing rights, which situation is considered to fall into a separate category. However, Canadian scholars have observed that it can be exceedingly difficult to distinguish between these two categories.

1.2.4. 'Comparison moment'

Misunderstandings when discussing retroactivity could also arise because of a different use of the 'comparison moment'. That comparison moment is the moment with which comparison is made in order to determine whether a statute has retroactive effect.

Some countries use the date of the entry into force of a statute as the 'comparison moment'.[18] This choice of the comparison moment seems to be related to the fact that, at least in most of these countries, the constitution (or another relevant law) provides that a statute should not enter into force prior to the date of publication.[19] In connection with the date of the entry into force of a statute as the 'comparison moment', legal discourse in most of these countries employs a conceptual difference between the date of entry into force of a statute and the 'effective entrance date' (or a comparable term such as 'date of effect') of a statute.[20] For example, if a tax statute enters into force on 1 December 2009 and states that it is applicable as from the tax year 2010, the effective entrance date is 1 January 2010. Hence, in the approach taken by these countries, in the case of retroactivity, the *date of entry into force* is still a future date, but the *effective entrance date* is a date in the past.

Some other countries use the date of publication of the statute in the government gazette as the comparison moment.[21] It seems that in some of these countries it is possible that the date of entry into force is set at a date of the past.[22] In that case retroactivity could be recognized where the date of entry into force of a statute is set prior to the moment of the publication.

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18. Belgium, Finland, France, the Netherlands, Spain, Sweden.
19. Belgium, Finland, the Netherlands, Spain, Sweden.
20. Belgium Finland, France, the Netherlands, Spain, Sweden. This distinction is also made in Poland.
21. Denmark, Germany, Greece, Hungary, Luxembourg. Note, however, that in Denmark legal discourse employs a conceptual difference that in outline has similarities with the other approach. In Canada the date of Royal Assent is the comparison moment.
22. For example, Austria.

The different approaches with respect to the comparison moment are not of a great relevance, but only affect the way 'retroactivity' is defined. Theoretically the two approaches could have different results with respect to the label 'retroactivity' in a concrete case, but the appraisal should not differ. For example, a statute that is published in the government gazette on 1 December 2010 enters into force on 1 February 2011, and would be applicable to taxable events that occurred after 1 December 2010 would be called retroactive in the first view but would not be called retroactive in the second view. However, it could be assumed that in the countries in which the first view is used, this retroactive effect would not be regarded as problematic at all from a legal certainty point of view (leaving aside the possible issue of retrospectivity).

1.2.5. 'Tax period-related concept' or 'taxable event-related concept' of retroactivity

A very interesting difference that appears from the national reports concerns the following issue. The issue is whether a tax statute that is enacted during a tax period (for example on 15 November 2010) and is applicable as from the start of that tax period (for example, 1 January 2010) should be characterized as 'retroactive'.

In some countries such a statute would indeed be called retroactive.[23] The basic idea is that such a statute should logically be characterized as retroactive, since the statute is also applicable to a period prior to the date of publication of the statute in the government gazette (or – depending on the comparison moment – the date of entry into force of the statute). Furthermore, the characterization 'retroactive' is considered appropriate because the statute applies to the events (expenses, income earned, transactions, etc.) that occurred prior the date of publication (or the entry into force). One could say that these countries use a 'taxable event-related concept' of retroactivity.

However, there are also many countries in which such a statute would not be considered retroactive but retrospective, at least by the courts.[24] In these countries a statute is only considered retroactive in case a tax statute is applicable to a tax period prior to the period in which the statute is enacted. The basic idea is that the tax obligation of period-related taxes (such as the personal income tax and corporate income tax) only arises at the end of the period, that the tax case therefore is not closed until the end of the period, and that therefore a statute enacted prior to the end of the period is not considered retroactive if it applies as from the start of the period. One could say that these countries have a 'tax period-related concept' of retroactivity.[25]

It is worth mentioning that in the UK the phenomenon that a tax statute is introduced during a tax year and applies as from the beginning of that tax year is even standard practice.[26] This UK practice (however) has to do with the constitutional requirement that, in short, there must be a Finance Act in every year. Also in Canada statutes are regularly intro-

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23. Denmark, Finland, Hungary, the Netherlands, Poland, Sweden. In Portugal, the issue is still, after the constitutional revision of 1997, under discussion. In Greece the issue is not considered important because retroactivity of tax statutes is constitutionally permitted as long as the retroactivity does not extend beyond the financial year prior to the year of the enactment of the statute.
24. Belgium, France, Germany, Italy, Luxembourg, Spain, Turkey. Noteworthy is that this approach by the German courts has been upheld by the German Constitutional Court in its important decisions of 7 July 2010. In Belgium, until recently, the Supreme Court had even a more far-reaching view (that, however, deviated from the view of the Constitutional Court): according to the Supreme Court, the applicable income tax rules for year x could not only be changed up to 31 December of year x, but even up to 31 December of year x+1 (the assessment year), without being considered (actually) retroactive. The opinion in Canada seems not to be clear; the Canadian reporter notes that it can be argued that such a statute is not retroactive.
25. Cf. the German reporter Hey.
26. In the US as well the practice is common.

duced that are applicable as from the beginning of the tax year. These statutes, however, tend to involve 'annual concepts', like thresholds and personal tax credits, rather than affecting transactions that occurred earlier.

These different approaches are not only of technical relevance. They have also consequences for the substance. As – in most countries – the standards that courts use for retroactivity differ from the standards used for retrospectivity,[27] it could obviously matter significantly whether or not a tax period-related approach of retroactivity is used in case a statute is tested that was enacted during a taxable period and applies as from the beginning of that period.[28] Furthermore, in connection with the latter point, even if courts in two countries were to use the exact same standards to judge retroactivity, the assessment of that statute would differ if in the one country a tax period-related concept of retroactivity is used, while in the other country a taxable event-related concept is used.

Worth mentioning is that some of the national reporters of the countries in which the tax period-related concept of retroactivity is used, note that this concept was developed by the courts, and that the approach is criticized in the literature and by some (lower) courts.[29]

If a tax period-related concept is used, the question arises to which kind of taxes the concept is applicable. Obviously, the concept applies to typical period-related taxes such as the personal income tax and corporate income tax. It is remarkable that the German legislator even considers the inheritance tax to be a period-related tax. Furthermore, it appears that in Germany the value added tax is also regarded as a period-related tax. In Belgium this is not the case.

1.2.6. Interpretative statutes[30]

Another conceptual variation relates to what are known as interpretative statutes. An interpretative statute is a statute that provides for the interpretation of another statute. Similarly, a statute that amends another statute in order to establish a certain interpretation of that statute can also be regarded as an interpretative statute. Interpretative statutes are often applicable as from the (past) entrance date of the interpreted statute. Various issues and questions arise with respect to the temporal effect of such statutes, including the characterization as retroactive.

First of all, it should be noted that, in some countries, the phenomenon 'interpretative statutes' is explicitly recognized as such. Interpretative statutes are considered a special category of statutes. This special status can have a legal basis[31] or can be construed in case

27. Namely that retroactivity is in principle not allowed while retrospectivity is in principle allowed.
28. Note, however, that the German reporter remarks that in July 2010 the German Constitutional Court delivered important judgments. In these judgments the 'tax period-related concept' of retroactivity was again confirmed. However, in these judgments, the court also postulated protection against retrospective changes, which is new. The German reporter notes that, therefore, the difference between the 'tax period-related concept' and the 'taxable event-related concept' of retroactivity will probably lose relevance.
29. Belgium and Germany.
30. See on this topic the contribution of Bruno Peeters and Patricia Popelier in this book.
31. Belgium and Luxembourg: in the Constitution; Italy (*legge di interpretazione autentica*): not in the constitution but in the civil code and the statute of taxpayer's rights; Spain has interpretative ministerial orders, which have a legal basis in the General Tax act.; United Kingdom: the Interpretation Act 1968 (which is a general Act of Parliament). Canada has the Interpretation Act. This act provides for, amongst other things, transitional rules with respect to the effects of legislative repeal and amendment; one of the provisions (paragraph 44(f)) of this act seems to have an effect that corresponds to an interpretative statute. Greece takes a special position in this respect. Interpretative statutes have a legal basis in the Constitution (referring to the 'authentic interpretation' that rests with the legislative power). However, as concerns tax statutes, the prevailing opinion is that, because of a constitutional provision with respect to retroactivity of tax statutes in general, tax interpretative statutes only have retroactive effect that does not extend beyond the financial year prior to the year of the enactment of the statute.

law.[32] In other countries 'interpretative statutes' are not explicitly recognized as a special category.[33] However, the national reports show that, nevertheless, the national legislators of some of the latter countries sometimes also grant retroactive effect to a statute, justifying the retroactivity by claiming that the statute only provides for a clarification of the interpretation of another statute.[34] In a few countries, however, retroactive interpretative statutes are (nearly) unknown or are considered invalid.[35] To conclude, most of the countries are in some way familiar with the phenomenon of retroactive interpretative statutes.

Secondly, the question arises whether, if an interpretative statute is applicable as from the past entrance date of the interpreted statute, the interpretative statute would be considered 'retroactive'. In most of the countries in which the law does not explicitly recognize 'interpretative statutes' as such, the answer to that question is positive: the statute would in general indeed be considered retroactive.[36] The question, however, is especially interesting with respect to countries in which 'interpretative statutes' are a special category. In some of these countries the statute would not be considered retroactive.[37] The basic idea is that the interpretative statute is supposed not to bring anything new to the interpreted statute. However, in other of these countries the term 'retroactive' is used, although distinguished from 'pure' retroactivity.[38]

Thirdly, the question arises whether the retroactivity of interpretative statutes is assessed in a different way from retroactivity of other statutes. This question is usually interrelated with the question what standards are used to distinguish an interpretative statute from a non-interpretative statute. Both questions are interesting especially, but not only, with respect to the countries in which the phenomenon 'interpretative statutes' is recognized as such in the law.

To start with the second question, theoretically two approaches can be distinguished. The first approach is – what we would like to call – the formal approach. In that approach a statute is considered interpretative if the legislator has labelled it 'interpretative'. Thus, the courts do not assess whether such a statute is really interpretative.[39] On the same lines, in some countries, the courts will, as a rule, give effect to the will of parliament if an interpretative statute is introduced.[40]

The second approach is – what we would like to call – the substantive approach. In this approach the national court assesses by means of certain standards whether a statute that is labelled interpretative by the legislator indeed can be characterized as interpretative. It could obviously be the case that a national legislator wrongly labelled a statute as 'interpretative'.[41] In most of the countries basically the second approach is taken.[42]

The subsequent issue is how to determine whether a statute is indeed interpretative. It seems that different standards are used. It is reported that an interpretative statute should not have new legal content.[43] Then the question remains when a statute is considered to

32. France (*loi interprétative*).
33. Austria, Denmark, Finland, Germany, Hungary, the Netherlands, Poland, Sweden, Turkey, the USA.
34. Austria, Canada, Germany (*Klarstellungsinteresse*), the Netherlands, and the USA ('technical corrections' and 'restatement of intended meaning').
35. Hungary, Poland, Sweden, Turkey.
36. Denmark, Finland, Germany, the Netherlands.
37. France, Luxembourg.
38. Belgium.
39. This is approach seems to be followed by the Supreme Administrative Court (*Council d'Etat*) in France.
40. Canada, United Kingdom.
41. In French legal discourse the term 'falsely interpretative statute' (*loi faussement interpretative*) is used. In Greece the terms 'not truly interpretative' and 'pseudo-interpretative statute' are used.
42. Belgium, Greece, and also the Supreme Court (*Cour de cassation*) in France.
43. National reports of Austria, France and Italy.

have new legal content. The issue is deeply intermingled with the issue of interpretation methods.[44] In Germany, an interpretative statute is considered interpretative if it stays within the interpretation limits of the statute to which the interpretative statute applies. This is even the case if the interpretation provided for by the interpretative statute deviates from the interpretation that the Supreme Court gave or might give.[45] Some other countries, however, seem to have a more strict view on interpretative statutes. For example, in Belgium it is the case that the interpreted legal provision, from its origin, could not possibly be comprehended in a way different from what was indicated in the interpretative law. If a statute that is labelled interpretative by the Belgian legislator does not meet this requirement, the retroactivity of the statute will be judged by the courts on the basis of the standards for retroactivity of 'normal' statutes. In Greece an important issue is whether the interpreted statute was indeed unclear; if that is not the case the interpretative statute is not considered truly interpretative. More or less the same applies for Italy, in which the standards are that there should be uncertainty, unclearness of the interpreted statute, different or contrasting interpretations by the courts or by the tax authorities. In Austria it is not regarded a problem that the interpretative statute confirms the view of the tax authorities, while some taxpayers have a defensibly different interpretation of the interpreted statute.[46] The ratio is that if there are different defensible interpretations, the taxpayer cannot trust a certain interpretation.

With respect to the first question, we note that in the above-mentioned countries in which an interpretative statute that is applicable to the past is not considered retroactive, the standards for 'retroactivity' of interpretative statutes are obviously different from those for retroactivity of other statutes. Some other countries provide a fine illustration of the interrelation between the first question and the second question. For example, in Belgium the standards for retroactivity of interpretative statutes are lower than for retroactivity of other statutes, but there is – as just seen – a strict view of the definition of an interpretative statute. In some countries in which interpretative statutes are not recognized as such, in principle no explicit different standards are used to evaluate retroactive interpretative statutes.[47] Obviously, if the interpretation provided is the same as the interpretation that the courts would give if the interpretative statute had not been enacted, the retroactivity is not a problem.

In various national reports it is explicitly noted that regularly statutes that are labelled interpretative by the legislator or as only a clarification are not really interpretative or, as the case may be, more than a clarification.[48] Furthermore, it is even noted that 'it has been common practice throughout the last 100 years that [government] uses an act of parliament to reverse the effect of a court decision or to remove a doubt about interpretation in favour of the official view.'[49]

1.2.7. **Validation statutes**[50]

An interesting phenomenon is the retroactivity of what are known as validation statutes. Such a statute 'validates' an existing legal practice and/or a certain view of, often, the tax authorities. The various national reports show that most of the countries are familiar with

44. Cf. German national report.
45. Germany.
46. This also seems to be the case in Belgian.
47. Canada, Denmark.
48. Canada, Germany, Italy.
49. National report of the United Kingdom.
50. See on this topic the contribution of Bruno Peeters and Patricia Popelier in this book.

the fact that the tax legislator sometimes introduces a statute with retroactive effect to validate an existing legal practice and/or a certain view of the tax authorities.[51] In some countries, however, retroactive validation statutes are (nearly) unknown or would be considered invalid.[52]

Three types of situation can be distinguished. A first type is that the validation statute is enacted at a moment that the courts have not yet decided whether or not the existing legal practice and/or the view of the tax authorities has sufficient legal basis in the law, i.e. is valid.[53] Sometimes the legislator then argues that the statute only provides a clarification of the existing law. We note that there could be a conceptual overlap with the phenomenon of interpretative statutes, described above, in case the statute 'validates' an interpretation.

A second type concerns the situation where the legislature acknowledges that a certain tax practice has no legal basis, and introduces a validation statute that is explicitly intended by the legislature to provide for a validation, i.e. a legal basis for that practice.[54]

The third type is that the validation statute is enacted further to a decision of a court in which the legal practice or the view concerned is rejected because it has no legal basis in the law or another view should be regarded as the correct one.[55] Especially where a court decision reveals there is a 'gap' in the tax law, the legislator may enact a validation statute with retroactive effect. In this second type the national authorities often first announce to the public, e.g. by press release or a circular, that a validation statute will be introduced, in order to avoid taxpayers developing confidence in the court's decision concerned.

In some reports the retroactivity of validation statutes is criticized especially with respect to the second or third type of situation.[56]

1.2.8. The relevance of the character of the statute concerned: procedural or substantive

Case law of the European courts, the ECJ as well as the ECtHR, shows that in order to determine the temporal effect of a statute the character of the statute is relevant. A *substantive* statute that has immediate effect applies to taxable events occurring after the date on which the statute enters into force. However, a *procedural* statute that has immediate effect is directly applicable to pending proceedings (so also to proceedings regarding taxable events that occurred prior to the date on which the statute enters into force).

For example in the (tax) case ECJ C-61/98 (*De Haan*), the ECJ ruled: 'it should be noted (…) that (…) procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force." The ECtHR takes a similar approach.[57]

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51. Belgium, Canada, Germany, France (*loi de validation*), Italy (*convalida legislativa*), the Netherlands, Spain, Sweden, the United Kingdom, the US.
52. Finland, Greece (nowadays), Luxembourg, Hungary, Poland, Portugal, Sweden, Turkey. A middle position seems to be the case in Denmark: if granted retroactive effect, a 'validation statute' would normally not be granted further retroactive effect than on the date on which the bill is introduced to parliament.
53. The French reporter call this 'indirect validation'. This technique has the aim 'to change the law applicable to a dispute pending before a court in order to prevent the annulment of the decision.'
54. This is considered a true validation statute (*loi de validation*) in France.
55. E.g. Belgium, Canada ('remedial retroactive tax legislation'), Germany (*Nichtanwendungsgesetze*), Italy, the Netherlands.
56. E.g. the national reports of Germany, Italy ('abuse of judicial activity').
57. E.g. (the non-tax case) ECtHR No. 26737/95, 19 December 1997, case *Brualla Gomez*, para. 35 refers to ''a generally recognised principle that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are under way."

Analysis of the various national reports shows that the above generally also applies in most of the countries,[58] however not in all countries.[59] A variant is that procedural rules do not apply to procedures initiated before the date the statute enters into force.[60] Note that also in this variant the new procedural rule does apply to the (new) procedures that relate to tax events that occurred in the past.

Thus, in principle, new procedural rules also apply to new, and often also pending, proceedings even if the matter of the proceeding is a taxable event that occurred prior to the date on which the statute enters into force. An exception, mentioned in most of the national reports, is the case in which the new procedural statute contains a transitional provision that states differently.

Furthermore, some of the national reports mention more specific exceptions. The immediate effect of a procedural rule may be limited to the extent that a new procedural rule cannot stipulate duties to cooperate for the past, based on the principle that a law may not impose an impossible obligation.[61] Also, sometimes, some rules of evidence or burden of proof will not be given immediate effect.[62] More in general the critical issue is raised that, from the perspective of taxpayers' rights, it is not always possible to differentiate between procedural and substantive rules.[63]

1.3. Ex ante evaluation of retroactivity

1.3.1. Limitations to retroactivity of tax statutes

Retroactive tax legislation is a commonly known phenomenon in the countries referred to in this general report. In the United Kingdom, Parliament has the power to enact by statute any fiscal law, retroactive tax laws included. In Canada, there are no constitutional limitations on retroactive taxation which means that it is legislative self-restraint that determines the frequency and extent of retroactive tax measures. In the other countries, however, there are (constitutional) limitations to the retroactivity of tax statutes.

Portugal and Sweden have a constitutional provision prohibiting retroactive tax laws. In Portugal, this constitutional provision is quite strictly applied. However, in Sweden the constitutional prohibition turns out to be a limitation, rather than a strict prohibition.[64] On the other hand, there are countries which are quite strict on retroactivity due to the (constitutional) courts. In Hungary and Poland, the constitutional courts developed quite a strict prohibition based on constitutional principles.[65]

Limitations may partially be absolute, turning out to be an absolute prohibition of retroactivity but only with a regard to a specific kind of legislation. This is the case in France with respect to the binding force of a judicial decision.

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58. Austria, Belgium, Canada, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Sweden, Turkey, United Kingdom.
59. Finland and the US. The Danish report notes that Danish legal theory as well as case law is not consistent with respect to procedural statutes at this issue.
60. Spain.
61. Germany.
62. France, Sweden.
63. E.g. the national reports of Greece, Hungary Italy, and Luxembourg.
64. Nonetheless, this is a strong prohibition. There is a communications procedure introduced as an instrument for parliament to legislate retroactively in certain situations, but this procedure has been created to maintain the rule of law in situations where rapid changes in tax law are motivated by strong public interests.
65. The principle of the rule of law and the principle of the democratic state under the rule of law, respectively.

In practice, therefore, in almost none of the participating countries does there exist an absolute ban on retroactive tax legislation, though in countries like Poland, Portugal and Hungary (through the court) a near prohibition exists, at least with regard to retroactive tax legislation which is unfavourable for taxpayers. Furthermore, the existing limitations are a matter of degree. Though (constitutional) limitations have a *prima facie* force, other reasons may have more force. Therefore, the force of the limitations to retroactivity have to be weighed against reasons pro, for example, grounds of general interest. See further section 1.5 on ex post evaluation (case law).

With regard to the legal source of the limitations to retroactive tax legislation there seem to be five variants. Sometimes different variants are present in one and the same country. Note that these variants concern tax statutes, not hierarchically lower tax rules.

The following variants may be distinguished.

- the limitations are derived from a general principle that is laid down in the constitution or in a constitutional text, e.g., the principle of legality, the principle of fairness, the principle of legal certainty, the principle of legitimate expectations, the principle of equality, the principle of the rule of law, the ability-to-pay principle, and the protection of property, personal freedoms, democratic state under the rule of law.[66]
- the limitations are explicitly laid down in a general provision, not only regarding tax statutes. This variant may be possible in theory, but does not occur in any of the countries under examination.[67]
- the limitations are explicitly laid down in a constitutional provision that specifically regards taxation.This variant occurs in Greece, Article 78. Para. 2 of the Constitution of Greece;[68] Portugal, Article 103, no. 3 of the Portuguese Constitution; Sweden, Article 2:10 of the Instrument of Government.
- the limitations are derived from an unwritten general principle of law; such as the principle of legal certainty, the principle of equality, the principle of legitimate expectations, the principle of equality, the principle of the rule of law.[69]
- the limitations are laid down in a non-tax law which is applicable to tax statutes, and reflect a general principle of law. This is the case in Belgium, Art. 2 of the Civil Code, and Luxemburg, also laid down in the Civil Code.

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66. Austria, Belgium, equality; Finland, a constitutional principle of 'avoidance' of retroactive tax legislation; France, the necessity of 'guaranteeing rights' and of the separation of powers (respect of the binding force of a judicial decision); Germany, the rule of law; Greece, the principle of equality (with regard to tax abatements); Hungary, the principle of the rule of law; Italy, the ability-to-pay principle, and the principle of legitimate expectations (derived from the principle of equality); Poland, democratic state under the rule of law; Spain, the principle of legal certainty; Turkey, the principle of the rule of law; USA, the Fifth Amendment to the American Constitution ('No person shall be … deprived of life, liberty, or property without due process of law') and the contract clause.
67. Many constitutions contain a prohibition of retroactivity for criminal law, see e.g. Belgium, Canada, Germany, Greece, the Netherlands, Turkey, USA. Consequently, retroactivity of the more severe tax penal statutes may be absolutely prohibited. Interestingly, the Greek Council of State does not apply the constitutional prohibition of retroactivity for criminal law in the case of tax penal statutes even in the case of the more severe ones. However, in its recent case law of the last five years it applies Art. 7, para. 1 ECHR on tax fines.
68. Greece has a constitutional provision prohibiting the unfavourable retroactive tax law if this tax law is effective prior to the fiscal year preceding the imposition of the tax. Furthermore, the Greek Constitution (Art. 78, para. 3) establishes that it is possible to collect consumer taxes and duties from the date on which a relevant bill is introduced in parliament, i.e., before the bill is put to the vote, as long as a time-limit for the promulgation of the law imposed by the Constitution is observed.
69. Examples of this variant with regard to the principle of legal certainty are Belgium, Denmark and the Netherlands. In Denmark, several other principles are at stake: the principle of legitimate expectations, the principle of equality, the principle of the rule of law, and the ability-to-pay principle.

1.3.2. **Transition policy**

Besides the constitutional and legal factors just mentioned, there are also 'informal' limitations. The legislator may formulate rules which set boundaries to the use of retroactive legislation (self-binding). Thus, the legislator may offer taxpayers guidance with regard to the use of the instrument of retroactive tax legislation. This is quite an exceptional situation. Some guidance may be offered by a parliamentary committee, as is the case in Finland, where lines are set by the standing Constitutional Law Committee.

A single country has an explicit 'transition policy' in the field of tax statutes, viz. the Netherlands. In his capacity of co-legislator, the Netherlands State Secretary of Finance has published (and discussed with parliament) a memorandum that incorporates the main lines of his 'transition policy' with respect to the introduction of tax statutes. The memorandum is not legally binding – it is a soft law instrument –, but it has some influence in the parliamentary debate, for example, in the event that a bill includes retroactive effect. The memorandum (also) contains policy guidelines with respect to granting retroactive effect to statutes and grandfathering.[70] In Canada the Department of Finance published a list of self-imposed restrictions on the use of retroactive tax legislation in a document issued in 1995 (the 'Finance Report') which – only – sets guidelines for the use of retroactive tax measures to clarify or correct an unintended interpretation of a tax provision by a court.

In other countries, less guidance is offered by government. Governments may have a general policy with regard to the quality of legislation, which also covers tax legislation, for example Denmark. However, this general legislative policy does not include a transition policy. Sometimes a general legislative policy concerns not the national but a regional level. For example, the Flemish region in Belgium played a pioneering role in developing a general legislation policy concerning the quality of tax legislation.

The German national reporter notes that there are neither official nor unofficial guidelines on the tax transition policy. The Ministry of Finance, who is drafting the tax bills in Germany, decides case by case. Sometimes a certain regularity may be apparent in the situations in which government provides for transitional rules, as is the case in Austria. It is very well possible that this regularity indicates a transition policy. Sweden reports that, it may be possible to derive an implicit governmental policy from the preparatory works – although a transition policy for legislation (tax legislation included) is lacking. In November 2004 the French government pledged to stop using retroactive provisions detrimental to the taxpayer. However, it is difficult to ascertain whether it marks a major change in legislative practice.

Furthermore, there may be 'rules of legislative technique' which also regulate the issues concerning transitional provisions. In Poland, these are rules of a technical character: recommendations as to the language of a statute, typical terms of a legislative language, layout of a normative act, etc.

Of course, a (constitutional) court may develop an (implicit) policy on the possibility of retrospective legislation with particular regard to retroactivity. Consequently, the tax legislator may be careful not to transgress the boundaries set by the court (infra, section 1.4).

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70. The memorandum sets out as the starting points of tax transition policy that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect (without grandfathering). Furthermore, the question whether or not (formal) retroactivity is justified is regarded a question of the balancing of interests: on the one hand, legal certainty of the individual taxpayers concerned and, on the other hand, the interests of society as a whole that are served by granting retroactive effect to the statute concerned. Whether or not retroactivity in a concrete case is justified depends on the circumstances of the case. However, two elements are distinguished: whether or not a justification exists for granting retroactive effect ('the substantive element') and the period of retroactivity (the 'timing element').

With regard to retroactive tax statutes that are favourable to taxpayers, these are generally not regarded problematic (e.g. Denmark and Luxembourg). Finland does not raise a question of retroactivity from the constitutional point of view and there is a policy, although not expressly stated. As for the Netherlands, the above-mentioned general memorandum of the State Secretary of Finance does not pay any attention to this topic.

1.3.3. **Ex ante control by an independent body**

Part of the legislative process may be the consultation of formal bodies which give their opinion on the quality of draft legislation, retroactivity included. However, an independent body applying any set of rules on an ex ante basis to review negative retroactivity, favourable retroactivity, retrospectivity, or grandfathering in tax legislation is by no means universal, as the examples of Austria and Canada show.[71] In many countries, though, a formal institution exists which reviews or advises on (draft) legislation.

This body may be another ministry, for example the Ministry of Justice, which reviews all bills.[72] Another variant is that consultative committees, such as a Council of State,[73] Council on Legislation,[74] or a court could (or even, should) be asked for – non-binding – advice.[75] However, the competence of such formal body may be limited, as is the case in Greece, where the Council of State has no consultative competence on substantive tax elements.[76]

Apart from these formal bodies, still other consultative committees may play an important role in the legislative decision procedure. This is the case in, for example, Greece which has a Court of Auditors.[77] Another example is Belgium, without there being specific formal advisory or consultative obligations for fiscal matters.

Finally, there may be a (parliamentary) standing committee for constitutional law, which examines a statute for compliance with the constitution before it is enacted.

The ex ante control by an independent body may be of a legal-technical nature or of a substantive nature. In Denmark, for example, the review by the Ministry of Justice is partly of a legal-technical nature, but also includes constitutional principles, EU law and retroactivity.[78]

The Belgian Council of State gives judicial, linguistic and legislative advice about draft decrees, preliminary bills and proposals of law, decree or ordinance as well as amendments concerning these.

The publication of the criteria for good legislation applied in the review process would enhance its transparency. However, these criteria are often not published. The Danish Ministry of Justice, for example, has not laid down explicit rules concerning this review.

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71. Nonetheless, the Canadian Senate might ask the House of Commons to adjust the effective date of a tax amendment, but in practice the Senate never does this. It is also possible for the executive to issue a "reference" to the Supreme Court of Canada regarding proposed legislation, although this process never occurs with respect to the proposed retroactivity of tax laws.
72. In Denmark, for example, all ministerial bills pass a consultation process that includes a review by the Ministry of Justice.
73. E.g. Belgium, France, Greece, Luxembourg, the Netherlands.
74. In Sweden government is in principle obliged to remit major items of draft legislation to the Council on Legislation, composed of members of the Supreme Court and the Supreme Administrative Court.
75. In Turkey the Supreme Administrative Court has advisory competence with regard to draft legislation in general, but this court has not advised in tax matters yet.
76. Substantive tax elements are established only by act of parliament, for which the Greek Council of State has no consultative competence.
77. Although the consultative competence of the Greek Court of Auditors does not regard tax bills, but pension law bills only.
78. Moreover, the bills' wording is also examined for precision and potential vagueness.

Rules may also not be known because the advice of this institution, which possibly may contain rules, is not published, as is the case with the advice of the French Council of State.

Even if criteria or rules are published, these may be general rules, which apply to all kinds of legislation. This goes for Sweden, which has no particular rules regarding tax legislation.

Also with regard to retroactivity itself, criteria or rules may be published which do not specifically concern tax statutes, but are of a general nature. The website of the Belgian Council of State, for example, uses a manual with recommendations published on its website. This manual also contains observations regarding retroactivity. Yet these observations do not specifically concern tax statutes, but are of a general nature. The manual states that, in general, legislative and administrative rules do not have retroactive effect. For retroactivity to be justified, certain conditions have to be met.

In the Netherlands, on the other hand, the Council of State has laid down criteria with respect to the question of when, in its opinion, granting retroactive effect to tax statutes is allowed. This Council of State uses these rules to review whether exceptional circumstances justify (formal) retroactivity that is disadvantageous for the taxpayers, with respect to the period of retroactivity, and whether or not grandfathering is necessary.

1.4. Use of retroactivity in legislative practice

1.4.1. 'Legislation by press release'

The legislator often announces envisaged changes of tax legislation. Sometimes, it also proposes retroactivity till the date of the announcement. In this respect, for example, it may use the instrument of 'legislating by press release':[79] it is announced in a press release that a bill is (or will be) proposed in parliament and that the bill provides for retroactivity till the date of the press release. Such a press release, which makes an envisaged change of tax legislation known to the public at large, is a particular kind of announcement. An official announcement may also be found in the parliamentary proceedings, for example with regard to a bill, a motion or an amendment.[80] Typically, here the temporal reach of the retroactivity of the tax act is connected to the date of the announcement.

As will be shown below, there are several variants. The general idea, however, is that, on the one hand, there is some kind of an announcement allowing taxpayers to adjust their expectations, and rely with reasonable certainty on what the law will be (legal certainty of taxpayers), and, on the other hand, retroactivity is applied till the date of the announcement (the timing element).

Of course, press releases are often used to announce cabinet decisions to put forward a bill or legislator's acceptance of a bill.[81] The bulk of the tax changes is often be introduced in the annual budget. Then, tax enactments may be made effective from the date of the annual budget announcement, as is the case in Canada.[82] In Sweden there is even a general obligation to communicate a proposal concerning retroactive tax legislation.[83] These press releases, however, are not used for setting the date as from which the new law will be

79. For an example, see the disputed retroactivity in ECJ C-376/02, *Stichting Goed Wonen II.*
80. In the Netherlands a bill only is published after the advice of the Council of State. In this constitutional context, a press release, for example published on the date the bill is brought before parliament (and sent to the Council of State for advice), is an instrument to inform the public of intended changes of legislation.
81. In the Netherlands press releases in tax matters are issued by a single member of government, the State Secretary of Finance, regularly after consultation of the Council of Ministers.
82. In Canada it is less common for changes to be announced by press releases, which do not have the constitutional formality or public exposure of annual budgets.
83. This is normally done through a press release or even a press conference.

applied. Thus, press releases, occasionally with respect to envisioned tax policy changes, are purely used for information purposes without any legal consequences attached to them (see for example Luxembourg and Turkey).

The legislative technique of 'legislation by press release' is not used in all countries in tax matters, as the reports from Austria, Denmark,[84] Greece, Hungary, Luxembourg, Poland, and Portugal show. In some countries, for example Hungary and Poland, the constitutional court acts as a blockade to 'legislation by press release.'

This use of this legislative technique may cause different degrees or intensities of retroactivity. This degree or intensity of retroactivity depends on the amount of time between the press release or announcement, i.e. the date till which retroactivity is applied, and the publication in the government gazette.

1.4.2. **Kinds of situation**

There are several variants. In the Netherlands, it happens that a press release announces that a bill will be proposed in parliament and that the bill provides for retroactivity till the date of the press release. Less far reaching is the situation in which it is announced in a press release that new tax legislation will be applied as from the date of the press release following the session of the Council of Ministers that has decided to propose a certain tax measure to be voted by parliament (for example, Belgium, Finland, the Netherlands and Sweden). Belgium also offers an example for another variant of this technique: the entry into force as from the date upon which the decision to enact the new legislation was published in the Belgian Official Gazette. In Spain, retroactivity is permitted back to the date of the publication of the draft retroactive provisions in the parliament's official journal. In the USA, Congress will frequently use a date prior to the enactment date of legislation as the limit of the extent to which the substantive provisions will be retroactively applied. Various dates may be used, including a date connected to an administrative pronouncement, or a date with significance in the legislative process including a presidential budget message, a committee announcement or press release, the release of a committee report and the date a conference agreement is reached. All these events may in some way be announced, for example by press release.[85]

Legislation by announcements, for example, a press release, pushes aside the legal certainty provided by the rule of law requirement of formal promulgation of new statutes in the constitutionally provided organ of publication.[86] Taxpayers are required to take note of an emerging new statute by other sources, which do not have the same reliability, as the constitutionally provided official gazette. No wonder that in many countries this practice gives rise to serious scholarly debate.

A justification may be found in cases of anti-abuse legislation or in cases where government wants to prevent what is known as the announcement effect, i.e. the situation where taxpayers, as soon as they become aware of future changes in legislation, take certain actions, make use of a loophole, which will undermine the effect of the legislation.

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84. Promulgation by press release (and other media, such as radio and TV) has occurred in Denmark, but not in connection with tax statutes. Retroactivity by press release, on the other hand, is very uncommon in Denmark other than in legislation in connection with collective agreement negotiations that break down and result in strikes.
85. Canada reports that there are many situations where a tax enactment might be made effective from the date of a press release rather than the more customary budget announcement, thus avoiding the government going through the more onerous budget process. Apparently, this method is used whenever the Department of Finance feels it is appropriate.
86. The one exception is the situation that the announcement and the formal publication of an approved bill, i.e. new statute, in the constitutionally provided organ of publication bear the same date.

In most countries it is hardly possible to classify the types of case in which the instrument of 'legislation by press release' is used. Such an announcement is likely to be used in various types of tax and other legislation, as the US report points out. In France, 'legislation by press release' is used for new tax incentives, in order to get effects of from the date of the announcement. With regard to the Netherlands, however, there are roughly two types of situation in which the instrument is used. The first is that the new statute is aimed at (existing or expected) abuse or improper use of tax rules. The second type of situation is that an existing favourable tax policy rule is changed or withdrawn, for example, a fiscal subsidy.

1.4.3. Retroactive period further back than the date of announcement

In exceptional cases the retroactive period of tax legislation reaches further back in time than the date of the announcement.[87] This occurrence may be related to a certain technique of retroactive legislation, for example validation statutes. In countries in which validation statutes occur, such as Belgium, France, the Netherlands and Turkey (supra, section 1.1 'Terminology') the retroactive period of tax legislation sometimes reaches further back in time than the date of the announcement. This also holds for cases where the legislator uses interpretative statutes.

It may also be the case that media reports, instead of an official press release, inform the general public, thus weakening the trust of the taxpayers (Germany).

Of course, a (constitutional) prohibition of retroactivity may rule out this possibility of retroactivity which reaches further back in time than the date of the announcement, as is the case in, for example, Portugal. In other countries, although a constitutional prohibition is lacking, this far-reaching form of retroactivity is rarely used.[88]

Note, however, that in several countries a (constitutional) temporal limitation exists as a consequence of which retroactivity which reaches further back in time than the date of the announcement is not banned. According to the Constitution of Greece, for example, retroactivity is permitted which does not extend beyond the fiscal year prior to the year of publication of the law. In Finland there also is a limitation: retroactivity may reach back to the beginning of the fiscal year. Obviously, this also holds for countries with a taxable period-related concept (supra, section 1.1 'Terminology').

There may be reasons for retroactivity which reaches further back in time than the date of the press release. These reasons may also occur in combination:

- public interest because of the risk of serious announcement effects (Belgium & Germany), possibly in conjunction with the degree of legal uncertainty for the taxpayers (Spain);
- tax avoidance or more broadly the elimination of a loophole (Canada,[89] the Netherlands, USA);
- correction of technical errors and omissions in prior legislation (Canada[90], the Netherlands, USA);
- inadvertently created hardships or benefits (USA);
- obvious (substantive) omissions and errors (the Netherlands);
- unfavourable judicial decisions (Canada), for example those with drastic negative budgetary consequences (the Netherlands).

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87. E.g. Belgium, France, Germany, the Netherlands, Spain, Sweden, USA.
88. E.g. Denmark, Finland, Poland.
89. To prohibit a particular tax avoidance strategy the Canadian legislator here uses remedial retroactive tax legislation, to 'clarify' a tax provision. The same strategy may be applied to 'overrule' an unfavourable judicial decision (see below).
90. Canada calls these kinds of errors neutral, corrective amendments, such as those that fix numbering, cross-referencing, and linguistic errors.

1.4.4. **Pending legal proceedings**

1.4.4.1. *Influence of retroactive tax statutes*

Retroactive effect granted to substantive statutes may influence pending legal proceedings, even though it may take much time for disputed issues to move through the objection and appeal process.

In some countries such as France, this often happens and it is frequently the explicit aim of the statute. This is occurs especially in cases of validation statutes. The same goes for Germany, where more generally, a statute which is enacted with unlimited retroactivity applies to any pending procedure. Pending cases are normally not excluded from the application of the new statute.

The USA reports that there is no established modern practice for Congress, but early cases allowed Congress to affect the outcome in pending cases through the enactment of retroactive legislation.

In the United Kingdom this sometimes happens, but not very frequently. In the same vein, Canada, where it can occur where there are long delays between the announcement and the enactment of legislation; in such cases the litigants are bound by the amended law.[91]

In Sweden retroactivity is generally not a problem since pending legal proceedings concern, with the exception of advance rulings, transactions already carried out. This way, legislation enacted (or a communication submitted) could not be applicable to a pending case. However, an advance ruling is based on the legislation in force when the ruling is given. If the legislation is changed before the transactions are made, the latter legislation is applicable and the advance ruling does not detract from that legislation.

1.4.4.2. *Pending legal proceedings excluded from application of retroactivity?*

In some countries, such as Canada and the Netherlands, there is no explicit prohibition in this respect. In the Netherlands, however, because most of the cases of retroactivity of legislation concern 'legislation by press release' the retroactive effect does not normally have the effect that pending legal proceedings are influenced. The same goes for Sweden; normally it is not a practical problem since retroactivity is generally not granted for more than perhaps a couple of months – not years.

In some countries pending legal proceedings are excluded from the application of the new statute, for example Denmark[92], Hungary, Italy, Portugal (because of the general non-retroactivity in tax matters). In Finland it is a merely theoretical situation, for retroactive effect is granted very seldom and in those cases the legislator acts fast.

In Greece pending cases may be affected only by explicit provision, and, in any case, within the limited time frame set by the constitution which expressly permits retroactivity as long as the latter does not extend beyond the financial year prior to the year of enactment of the law.

Spain reports that, in principle, pending legal proceedings are excluded from the application of the new statute, so there seems to be some latitude for the legislator.

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91. Although it is unclear to what extent legislation that is retroactive prior to announcement can affect pending legal proceedings that turn on substantive issues which arose years in the past (but after the effective date).
92. In Denmark it is commonly accepted that amendment of procedural statutes has effect on pending legal cases unless otherwise stated in the amendment's transitional provisions. As a rule, however, procedural legislation will contain transitional provisions.

The same goes for Belgium: in principle, pending legal proceedings are excluded from the scope of a new substantive statute. If this occasionally happens, however, strict conditions have to be met.

1.4.5. Retroactivity favourable to taxpayers

The legislator sometimes grants retroactive effect to tax statutes that are favourable to taxpayers. However, in some countries this does not happen, an example being Belgium.

In other countries, such as Hungary and Greece, granting such favourable retroactive effect to tax statutes is possible, but it does occur only in very exceptional cases, and, especially in Greece, only if the constitutional principles of tax equality and of separation of powers (and res judicata) are not infringed. Germany reports that, although the legislator is free to grant this kind of retroactive effects to tax statutes, favourable changes with retroactive effect are rather rare. One of the reasons for this might be to compensate for a long-lasting political debate or a protracted legislative procedure. In Turkey this type of retroactivity occurs, whereas the principle of equality sets limits to the measure concerned (although there is some scholarly debate on this issue). Spain reports that this kind of retroactivity only applies to administrative penalties, surcharges and, occasionally, to late interest and special cases of tax liability.

Still other countries report a more frequent use of favourable changes with retroactive effect. In Austria, Canada and the United Kingdom it is not uncommon. In France it happens frequently, in cases of 'legislation by press release', and in Italy it is generally permitted

The Netherlands legislator regularly grants retroactive effect to tax statutes that are favourable to taxpayers, seemingly mostly in situations in which the field of application *ratione materiae* of a provision has a different scope than expected and intended.
The USA reports that such effects are common when, as part of the income tax, Congress enacts "extender" legislation after a provision that was subject to sunset has expired.
As for the kind of situation in which this kind of favourable retroactivity is granted, there often is no specific pattern, as Danish reporter states, the decisive factor being a political desire to favour taxpayers retroactively. On the other hand, in Finland a tax relief is considered a typical situation.

1.5. Ex post evaluation of retroactivity; case law on retroactivity

1.5.1. Introduction

If the legislator introduces a tax statute with retroactive effect that is disadvantageous for taxpayers, taxpayers may appeal to court to challenge the retroactivity. Whether or not such a challenge would be successful depends on (i) the possibilities the courts have to test retroactivity, (ii) on the standards that the court uses to assess whether or not the retroactivity concerned is legitimate, and of course, (iii) on the legislator's reasons for the retroactivity at hand. In this section, we deal with the first two aspects. In principle, courts would have the following the possibilities to test retroactivity:

- testing against the national constitution;
- testing against general principles of law;
- testing for compatibility with international treaties.

There may be an overlap between these possibilities. The principle of legal certainty is a fine example. This principle is, in the first place, a general principle of law. The principle may, however, also be enshrined in the constitution (or courts may derive the principle from another general principle enshrined in the constitution). Furthermore, the principle of legal certainty is also relevant when testing of retroactivity for compatibility with international treaties. First of all, according to settled case law of the ECJ, the principle of legal

certainty and the principle of legitimate expectations are characterized as general principles of EU law.[93] Secondly, although the principle is not explicitly laid down in the European Convention on Human Rights, the European Court has ruled that the principle of legal certainty is necessarily inherent in the law of the Convention.[94] As such, the principle plays a role in the case law of the European Court with respect to, for example, Article 6 ECHR and Article 1 of the First Protocol ECHR.

1.5.2. **Possibilities and limitations to test retroactivity**

Not all the above-mentioned three possibilities may be available for national courts. The courts' competence may be limited, for example by the constitution. In this respect the nature of the tax statute concerned may also be relevant.

In most countries the courts are allowed to test statutes, including acts of parliament, for compatibility with the constitution.[95] Note, however, that in some of these countries not all courts are permitted to do such a test, but only a specific court, often the constitutional court, is allowed to do so.

In the Netherlands, however, the Constitution prohibits acts of parliament being tested for compatibility with the Constitution or with ('unwritten') general principles of law. Acts of parliament may only be examined for compatibility with international treaties.[96] Since the constitutional prohibition of testing legislation only concerns acts of parliament, other legislation (for example, municipal legislation) could, however, be examined for compatibility with the Constitution as well as with general principles of law. In France the situation was very similar to the situation in the Netherlands. However, recently the French Constitution has been amended and it is noted by the French reporter that the impact of this reform is hard to predict. Further, in Canada and the UK courts do not test tax statutes for compatibility with the constitution or general legal principles.[97] This is based on the idea of sovereignty or, as the case may be, supremacy of parliament. In these countries, the issue of retroactivity is for courts only an issue of statutory interpretation: whether or not a statute has retroactive effect[98] – if it has retroactive effect, the courts apply the statute retroactively.[99]

The international treaties that are the most relevant for testing retroactivity are – at least in the European context – the EU Treaty and the European Convention on Human Rights.

As mentioned above, according to settled case law of the ECJ, the principles of legal certainty and legitimate expectations are considered general principles of EU law. Hence, in case the national tax legislation concerned falls under the scope of EU law, the retroactivity can be tested against the EU principles of legal certainty and legitimate expectations. Thus, if the national legislation concerns VAT, the retroactivity can be tested against these princi-

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93. ECJ C-376/02, 26 April 2005, *Stichting Goed Wonen II*, para. 31.
94. E.g. the non-tax case ECtHR no. 6833/74, 13 June 1979, case *Marckx*, para. 58.
95. Austria, Belgium, Denmark, Finland, Germany, Greece, Hungary, Italy, Poland, Portugal, Spain, Sweden, Turkey, the USA.
96. It should be noted that at this moment there is a legislative proposal pending to change the Constitution on this issue. The proposal does not, however, provide for an overall withdrawal of the constitutional prohibition, but only in an amendment of it to allow – as an exception – the judge to test acts of parliament against certain constitutional provisions.
97. The Canadian reporter notes that some taxpayers have challenged retroactivity, advancing arguments based on the Charter of Rights and Freedoms, the Bills of Rights and unwritten unconstitutional principles, but that all these challenges have failed.
98. In this respect a 'rebuttable presumption of non-retroactivity' applies.
99. The same applies de facto in Finland and Denmark.

ples.[100] Moreover, as the case at hand should fall under the scope of EU law, not in all cases can retroactivity of national tax legislation be tested for compatibility with these EU principles.[101] Thus, the nature of the statute concerned, or at least of the case at hand, is important in this respect. As regards the standards to judge retroactive tax legislation, case law of the ECJ shows that retroactivity is in principle prohibited ("the principle of legal certainty precludes a measure from taking effect from a point in time before its publication"). However, this is not an absolute prohibition. If two requirements are met, the retroactivity may be permissible according to the ECJ. Retroactivity may be permissible "where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."[102] Note that although retrospectivity is in principle allowed according to the ECJ, in that case as well legitimate expectations should be respected.[103]

With respect to the European Convention on Human Rights, in principle, Article 6 ECHR, Article 7 ECHR and Article 1 of the First Protocol ECHR are important for testing retroactivity. The principle of non-retroactivity of Article 7 ECHR, however, only concerns criminal offences. Furthermore, according to settled, but criticized, case law of the ECtHR, pure tax disputes do not fall under the scope of Article 6 ECHR.[104] Therefore, for retroactivity of tax legislation (not concerning tax penalties) only Article 1 of the First Protocol ECHR remains as a possibility to test retroactivity. Indeed, case law of the ECtHR shows that retroactivity of tax legislation can be tested against Article 1 of the First Protocol ECHR.[105] However, retroactive tax legislation is in principle not prohibited by Article 1 of the First Protocol ECHR.[106] The question to be answered is whether "the retrospective application of the law imposed an unreasonable burden (…) and thereby failed to strike a fair balance between the various interests involved." Whether or not this is the case, "depends, first, on the reasons for the retroactivity and, secondly, on the impact of the retroactive law on the position of the applicants."[107] Important is that the ECtHR has ruled that "a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation" and that the legislator's assessment is accepted unless it "is devoid of reasonable foundation".[108] It should be noted that the ECtHR is stricter towards retroactivity with respect to one type of situation. This concerns the situation where the

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100. E.g., ECJ C-381/97, 3 December 1998, *Belgocodex*, ECJ C-396/98, 8 June 2000, *Schloßstraße*, ECJ C-62/00, 11 July 2002, *Marks & Spencer*, and ECJ C-376/02, 26 April 2005, *Stichting Goed Wonen II*. See also for retrospectivity ECJ C-487/01 and C-7/02, 29 April 2004, *Gemeente Leusden/Holin Groep*. For retroactive charging by the tax administration see e.g. ECJ C-181/04 and 183/04, 14 September 2006, *Elmeka*.
101. The answer to the question when exactly an act can be tested for compatibility against a general principle of EU law does not seem to be very clear yet. See for one view S. Douma, 'The principle of legal certainty: enforcing international norms under community law', in: S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam, IBFD, 2008,) at pp. 217-249.
102. EC, C-376/02, 26 April 2005, *Stichting Goed Wonen II*. See also e.g. ECJ C-381/97, 3 December 1998, *Belgocodex*, ECJ C-396/98, 8 June 2000, *Schloßstraße*, ECJ C-62/00, 11 July 2002, *Marks & Spencer*. For retroactive charging by the tax administration see e.g. ECJ C-181/04 and 183/04, 14 September 2006, *Elmeka*.
103. E.g, ECJ April 29, 2004, C-487/01 and C-7/02 (*Gemeente Leusden/Holin Groep*).
104. ECtHR no. 44759/98, 12 July 2001, *Ferrazzini*. This case law has been criticized in the literature; see for example Lee, Natalie, 'Time for Ferrazzini to be reviewed?', *British Tax Review* (2010), at pp. 589-609.
105. E.g. ECtHR 10 March 1981, no. 8531/79 (*A.B.C. and D.*), ECtHR 23 October 1997, nos. 21319/93, 21449/93 and 21675/93 (*National & Provincial Building Society c.s.*), ECtHR 10 June 2003, no. 27793/95 (M.A.), and ECtHR 23 July 2009, no. 30345/05 (*Joubert*). See about the ECtHR case law in this respect, e.g., Baker, Philip, 'Retroactive tax legislation and the European convention on human rights', *British Tax Review* (2005), pp. 1-9, and, in extenso, Pauwels, *supra* note 3, at pp. 401-440.
106. E.g. ECtHR no. 27793/95, 10 June 2003, (*M.A.*).
107. E.g. ECtHR no. 27793/95, 10 June 2003, (*M.A.*).
108. E.g. ECtHR nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, *National & Provincial Building Society c.s.* and ECtHR no. 27793/95 10 June 2003, (*M.A.*).

retroactive law decisively influences a pending proceeding before court. The ECtHR considers that "the principle of the rule of law and the notion of fair trial (…) preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute." This rule also applies to retroactive tax laws.[109] Note that also here there is no absolute prohibition, as there may be "compelling grounds of the general interest" that justify the legislature's interference through the retroactive law.[110]

It can be assumed that, in principle, the possibilities that international treaties provide to courts for testing retroactivity are less important in the countries in which courts are constitutionally allowed to test retroactivity against the constitution, than in countries in which courts are not permitted to do so.

This assumption gets support in the various national reports, at least with respect to Article 1 of the First Protocol ECHR. On the one hand, in most of the countries in which courts are constitutionally allowed to test retroactivity against the constitution, Article 1 of the First Protocol ECHR does not play a role in case law (at least up till now).[111] On the other hand, in countries in which there are constitutional restrictions for the court to review acts of parliament, Article 1 of the First Protocol ECHR is regularly invoked by taxpayers for the courts to challenge retroactivity.[112]

In general, in countries in which courts test retroactivity of tax statutes for compatibility with Article 1 of the First Protocol ECHR, the various national courts have not, or very rarely, ruled retroactivity incompatible with that provision.[113]

Notwithstanding the above, it could (at least theoretically[114]) be that also in countries in which courts are constitutionally allowed to test retroactivity against the constitution, international treaties provide extra possibilities. This could be the case if the constitution does not impose restrictions on the retroactivity of tax legislation. This could also be the case if the restrictions that the constitution imposes (or at least the restrictions that courts derive from the constitution) are less strict than the restrictions that the international treaties impose.

1.5.3. **Standards applied when testing retroactivity**

The standards applied to test retroactivity of tax statutes in the different countries vary. An important reason is the variety of the restrictions that the constitutions impose with respect to retroactivity.

Furthermore, even if roughly the same standard were to be used in two countries, the way the courts use the standard may differ. This is caused by the fact that standards are usually abstract to a certain extent, which may have the effect that the application of the standard in a concrete case may differ. For example, the standard may be that retroactivity is only allowed in the case of special circumstances, or in case there are weighty reasons, but

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109. E.g. ECtHR nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, *National & Provincial Building Society c.s.* and ECtHR no. 30345/05, 23 July 2009, *Joubert.*
110. Which was the case in ECtHR nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, *National & Provincial Building Society c.s.*
111. Austria, Hungary, Germany, Greece, Italy, Poland, Portugal, Spain, Turkey. This is obviously also the case in countries in which the national legislator does not introduce (disadvantageous) tax statutes with retroactive effect; for example Luxembourg.
112. France, the Netherlands.
113. Belgium, Denmark, Finland, France (exceptions are some administrative court decisions on a specific interpretative act, but the Supreme Administrative Court has not ruled yet), the Netherlands (exception is one case of a high court), Sweden, the UK.
114. In none of the various national reports an example was mentioned along this line.

there could be different results in a concrete case due to the fact that judgments may differ with respect to the question whether or not special circumstances exist, or whether the reasons the legislator had for the retroactivity are sufficiently 'weighty'.

Not in all countries are standards of the courts for testing retroactivity of tax statutes. This is obviously the case in countries in which the legislator does not introduce tax legislation with retroactive effect, notwithstanding the absence of a constitutional prohibition for the legislator in this respect.[115]

It could also be that standards are absent for another reason. One reason could be that there is a constitutional obstacle for courts to test retroactivity, which is – as seen above – the case in France and the Netherlands, at least with respect to acts of parliament. Another reason for the lack of standards could be that, although tax statutes may in principle be tested for constitutionality, case law shows that the chance that a court would declare retroactivity unconstitutional is merely theoretical.[116] In the same line, standards could be absent in countries in which the courts do not test the retroactivity of tax statutes, because granting retroactive effect to a tax statute is considered a political decision or because of the idea of the sovereignty/supremacy of parliament.[117]

However, the national reports show that in most of the countries standards are developed and used by the courts to test retroactivity, albeit sometimes standards are laid down directly in the constitution concerned.

In some countries the standards applied with respect to retroactivity are (partly) *formal* in the sense that the period of retroactivity is a decisive factor.

The most extreme standard in this respect is that – due to constitutional restrictions or due to restrictions derived by the courts from a general principle of law – retroactivity is never allowed in case it is disadvantageous for taxpayers.[118]

Another example is the standard that retroactivity is never allowed if and insofar as the period of retroactivity reaches beyond a certain period. This is the case in Greece for retroactivity that is unfavourable for taxpayers.[119] The Greek Constitution provides that such retroactive effect of a tax statute may not go beyond the fiscal year preceding the year of the publication of the statute (hence, a tax statute imposed in 2010 may not impose retroactively tax on income earned in the year 2008).[120]

The period of retroactivity could also be a decisive factor the other way around, namely that retroactivity is in any case allowed as long as retroactivity stays within a certain period. This is the case in Greece: retroactivity of tax statutes to the fiscal year preceding the year of publication of the statute is in any case allowed. In a certain sense this is also the case in countries that have a 'tax period-related concept' of retroactivity (supra, section 1.1). Since in these countries a statute that is introduced during a fiscal year (e.g. in November 2009) and that applies as from the beginning of that year (e.g. 1 January 2009) is not considered retroactive, backdating is thus in any case allowed to the extent that it stays within the fiscal year.

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115. Luxembourg.
116. Denmark, Finland. In Finland the courts see themselves to be bound in their judicial review to the guidelines of the Constitutional Committee. If the Constitutional Committee has not challenged retroactivity, the courts dare to do that independently.
117. Canada, the UK.
118. Hungary, Poland, Portugal.
119. For favourable retroactivity no time limit applies.
120. An exception applied in a situation in which the ECJ found a tax exemption provided by the Greek tax law to be prohibited state aid. The tax that was levied retroactively beyond the time limit allowed by the Greek Constitution. The Greek Council of State did not consider this to be a violation of the Greek Constitution.

In most countries, however, courts employ, whether together with a formal standard in the above-mentioned sense or not, *substantive* standards. The following can be derived from the national reports:[121]

- In Austria the Consitutional Court considers retroactivity incompatible with the principle of equality, viz. its sub-principle legal certainty, if it infringes legitimate expectations. To assess whether there is such an infringement, the Court first looks at the clarity of the legal statute that was changed retroactively. If it was clear that that legal statute provided for a lower tax burden, then the significance of the tax burden and the gravity of the grounds of justification for the retroactivity are taken into account in order to assess whether the principle of legitimate expectations is infringed. These criteria have to be balanced case by case.
- In Belgium the Constitutional Court does not consider every retroactive statute to constitute an infringement of the principle of legal certainty. First of all, it is possible that retroactive provisions simply confirm legal rules that had been published earlier. Secondly, retroactivity can be justified in certain circumstances. Whether grounds for justification are present is examined on a casuistic basis. Justification is possible when the retroactive effect of a legal rule is indispensable to achieve a goal of public interest, such as the well-functioning or continuation of public services. The interest of public revenue is only accepted as a justification when it is accompanied by other persuasive considerations. Furthermore, in the situation in which the retroactive effect of an act substantially influences the outcome of pending cases, a strict approach applies: either "exceptional circumstances" or "compelling motives of public interest" are required. Notwithstanding these strict requirements, case law shows that it is possible that there are situations in which courts accept that such exceptional circumstances are present.
- In Finland the Supreme Court would rule that retroactivity is unconstitutional in case the legislator does not meet the test formulated by the Constitutional Law Committee.
- In Germany the Constitutional Court holds in principle that there is a ban of retroactivity, but allows exceptions.[122] A first exception is the situation in which a reasonable taxpayer cannot claim trust in the (still) prevailing legal situation, which is the case (i) from the date of adoption of the bill in parliament, or (ii) in the case of an evidentially unclear or unconstitutional legal situation.[123] A second exception is the situation in which the confidence in the prevailing legal situation has to be subordinated to the interest of the legislator to change the law retroactively. This applies if (i) the disadvantage the taxpayer suffers from the retroactive enactment is negligible (de minimis rule; it can be seen as an outcome of the principle of proportionality), and (ii) the legislator can claim overriding urgent/compelling public interest. Mere public revenue interest has never been accepted as the only ground of justification, but it could be combined with facts which shake the taxpayer's faith, for example the legislative intent to combat announcement effects.
- In Italy the Constitutional Court tests retroactivity against the constitution and the enshrined general principles; the constitutional 'ability-to-pay principle' is invoked, but more recently also the principle of legitimate expectations is used. On the basis of this latter principle, retroactivity of tax statutes must be justified by 'reasonablness' and may

121. Please take into consideration that that the question whether or not a justification exists for *retroactivity* is preceded by the question whether or not there is retroactivity. As the latter question may be answered differently (for example, depending on whether a 'tax period-related concept' or a 'taxable event-related concept' of retroactivity is used; see section 1.2.5) it could be that, for the same situation, the court in the one country has to answer the former question but that the court in another country does not get around to that question.

122. For the approach of the German Constitutional Court with respect to retrospectivity, see the German national report. Here we note that, interestingly, the court has recently imposed more strict limitations to retrospectivity.

123. This latter exception was invented to overcome the transition period after the Second World War, but has hardly ever been used.

not be in conflict with 'values and constitutional interests'. In general, the protection of a higher collective interest could be accepted as a justification: for example, the curbing of tax evasion and the abuse of tax laws, or the existence of an extraordinary economic situation. Sometimes also 'Treasury requirements' based on extraordinary fiscal needs are accepted.

- In the Netherlands, the Supreme Court takes the position that deviation from "the legal principle based on the requirements of legal certainty that legislative measures should only apply for the future" to the disadvantage of taxpayers is only justified in the case of 'special circumstances.'[124] It is not entirely crystallized out which circumstances could qualify as such a special circumstance. Though it is clear that in case the taxation for which the retroactive rule provides was foreseeable for taxpayers, the retroactivity concerned could be justified. Up till now, the Supreme Court has never ruled in a concrete case that the retroactivity at stake was incompatible with the principle of legal certainty. The Supreme Court did, however, once rule in a case of retrospectivity (immediate effect without grandfathering) that the principle of legal certainty had been infringed.
- In Spain retroactivity of tax statutes is forbidden unless 'it is justified by serious reasons of general interest.' Constitutional case law provides examples of cases in which retroactivity is considered not unconstitutional as well cases in which retroactivity is deemed to be unconstitutional.
- In Sweden, based on a constitutional provision, retroactivity of tax statutes is in principle prohibited, unless one of the exceptions applies that is described in detail in that constitutional provision. One of these exceptions applies when the government or a parliamentary committee has presented a tax bill to parliament. In such a case, tax can be levied already as of the day that the bill was presented to parliament. The same applies when the government transmits to parliament a written communication stating that a tax bill will be forthcoming. This possibility has frequently been used, especially in order to hinder undesired consequences of tax law, such as undesired tax planning and tax evasion. According to the constitutional provision, the parliament may furthermore prescribe that exceptions shall be made on the principle of non-retroactivity if it considers this is warranted on special grounds connected with war, the danger of war or grave economic crisis. It is noted that only once did a court deem a retroactive tax statute unconstitutional.
- In Turkey the Constitutional court takes the following position: 'Under the principle of non-retroactivity, the statutes must be applied on subsequent legal actions, events or transactions that are occurred after their enactment. Exceptional cases may appear which are accepted as necessary for public interest or public order or for the protection of vested rights or for the improvement of financial rights.' Although the Constitutional Court has tested retroactive tax statutes in a few cases, no retroactive tax statute has found to be incompatible with the Constitution.
- In the US, there are technically two strains of federal constitutional doctrine that can be invoked to limit the enactment of retroactive taxes,[125] but in modern practice these two are generally viewed as one. In the important case United States v. Carlton (1994) it was noted by the majority opinion of the Supreme Court: 'Provided that the retroactive appli-

124. Note that this case law concerns rules not being acts of parliament. As mentioned above, the Netherlands courts are not allowed to test acts of parliament against the Constitution or 'unwritten' general principles of law, but only against norms included in treaties.

125. The first involves potential limits on the power of the federal Congress, primarily under the Fifth Amendment's command that property not be taken by Congress without due process of law, but also under the 'contract clause.' The second involves the potential limits under the fourteenth amendment on the state legislatures' ability to impose taxes.

cation of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.' Furthermore, the majority opinion effectively dismissed the only set of cases (dating from the years 1927 en 1928) in which the Supreme Court held that, in these cases, retroactive taxes imposed by Congress were invalid. Thus, nowadays, the Supreme Court does not impose strict limitations on the use of retroactivity.[126] In a certain type of situation the Supreme Court is, however, more stringent. The Supreme Court is very hostile to attempts by state legislators to limit the effect of judgments holding state taxes invalid. It is expected – based on the separation of powers doctrine – that the same would apply in case the Congress were to try to cure defective (federal) tax collections.

This overview shows that the *substantive* standards to test retroactivity vary. However, there are some general lines. The general substantive standard is generally that there should be a justification for retroactivity that is disadvantageous for taxpayers. There are basically two lines of justification, although not in all above-mentioned countries the two lines are both employed. First, the line that concerns the expectations of taxpayers: retroactivity could be allowed in case retroactivity is considered not to infringe taxpayers' reasonable expectations. Secondly, the line of a compelling public interest: retroactivity could be allowed in case an overriding public interest is served by the retroactivity. Note that the first line implies that the weight of legal certainty is considered low, while the in the second line the public interest outweighs the principle of legal certainty. Both lines show that the issue of retroactivity is a 'balancing act'. Noteworthy is also that, at least in some of the countries, the mere public revenue interest is not accepted as the only justification for retroactivity.

1.5.4. **Final observations**

In general, it can be observed that in the various countries the standards that courts impose for retroactivity of tax legislation differ significantly. On the one side, there are countries in which the courts (almost) fully leave the issue of granting retroactive effect to tax legislation to the discretion of the legislator (or parliament, as the case may be). On the other side, there is a group of countries in which an (almost) absolute prohibition of retroactive taxes applies. Between these opposite positions, there are countries in which courts review whether legislator's decision to grant retroactive effect stays within certain (formal and/or substantive) standards. These differences are at first sight remarkable.

More research should be done on this issue, but it seems that the differences partly have historical roots. Countries in which the restrictions for retroactivity are the most stringent have often recently overcome a non-democratic past.[127] Further, countries in which courts in principle (almost) fully respect the legislator's decision to grant retroactive effect to tax statutes often have a strong democratic history.

126. Please note that the *state* courts (at least some of them) impose more stringent limitations on retroactivity than the Supreme Court. There are also recent examples of cases in which a state court found retroactivity invalid; see the US report.

127. Compare the Hungarian national report for an observation along this line for Hungary.

1.6. Views in the literature

1.6.1. Opinions regarding retroactivity

The literature regarding the prohibition on retroactive legislation corresponds, to a large extent, to the national constitutional and legal provisions and the national case law on retroactivity. In Greece, for example, the prevailing opinion is that there is a duty to protect the constitutional temporal restrictions. In the USA, academic writers find few constitutional problems with retroactive tax legislation. The Turkish literature strongly opposes the case law of the Turkish Constitutional Court.

In one country there is hardly any debate in the literature (Hungary). In many countries, the literature largely focuses on conceptual distinctions and the legal consequences connected to the different concepts, the (weight of the) principle of non-retroactivity, and grounds of justifications (e.g. Germany, the Netherlands). Tax law scholars and sometimes constitutional law scholars may contribute to the debate (e.g. Sweden). In Austria the tax literature does not deal with the problem of retroactivity in a way that goes beyond the case law of the Constitutional Court.

Scholars generally take a critical stance towards retroactivity, their concern being among other things proportionate protection of legal certainty and predictability (e.g. Spain). In Canada practitioners tend to criticize all forms of retroactive tax laws, while academic lawyers approach the problem more thoughtfully. Possible justifications of the use retroactivity are often debated, e.g. targeting abuse or avoidance or the prevention of announcement effects or 'windfall gains', and sometimes closing gaps in tax law. However, even when scholars accept that retroactive effect may sometimes be granted, this does not imply a *communis opinio* with respect to the question when retroactivity of tax legislation is justified (e.g. the Netherlands). Policy changes in favour of the taxpayer are often debated, also in countries with a prohibition of non-retroactivity (Poland, Portugal). In the USA, the desirability of general policies when tax changes are made is still a matter of considerable debate, especially to prevent infringements of the principle of equality.

Therefore, it seems that the appreciation of retroactivity partly depends on the legal culture of a country.

1.6.2. Debate on law and economics view on transitional law

The law and economics view has hardly provoked any debate in the tax literature, as far as the reviewed European countries and Canada are concerned. In these countries, though, in other fields of law the law and economics movement is often flourishing. The one country where law and economics is an important view in the scholarly tax literature is the USA.